No. 85-1198

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE F. GROM, SERGEANT (E-5),
UNITED STATES MARINE CORPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. Whether the court below erred in requiring an affirmative showing of specific, articulated prejudice rather than evaluating the totality of circumstances in considering whether petitioner was denied his Sixth Amendment right to speedy trial?

2. Whether petitioner was denied his Sixth Amendment right to speedy trial when the government ignored his request for immediate trial and subjected him to an inordinate delay solely as a tactical maneuver to search for any evidence to justify its preferring otherwise unsubstantiated additional criminal charges against him?

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CONSTITUTION, STATUTES AND RULES:

United States Constitution, Sixth Amendment, Speedy Trial Clause 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, George F. Grom, Sergeant (E-5), United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 21 M.J. 53 (C.M.A. 1985) and set out in the Appendix, *infra,* at p. 1a. The opinion of the United States Navy-Marine Corps Court of Military Review is not reported and is set out in the Appendix, *infra,* at p. 11a.

JURISDICTION

The judgment of the Court of Military Appeals was entered on November 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION:

Amendment VI provides in pertinent parts:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

STATEMENT OF THE CASE

I. FACTS

In January, 1982, eight months after the military preferred charges and almost one year after arrest by civilian authorities on similar charges, petitioner George F. Grom was finally brought to trial. The special court-martial in which he was convicted took place six months after petitioner, a sergeant in the United States Marine Corps, demanded immediate trial by the military authorities. The civilian charges had been dismissed.

This case began on January 23, 1981, when civilian and military law-enforcement authorities arrested petitioner at his off-base apartment. The civilian authorities had searched the apartment based on the tip given to military authorities by an informant, an active duty marine working for the Naval Investigative Service (NIS). Although the military deferred the matter to civilian authorities for prosecution, NIS agents participated in the investigation. An NIS agent accompanied the civilian authorities to the apartment

for the search. In addition, on the day of petitioner's arrest, NIS agents obtained sworn statements from three other servicemen who admitted their personal involvement in drug transactions and identified petitioner as their supplier.

Subsequently, on March 25, 1981, the civilian authorities, having lost the evidence, dismissed the charges against the petitioner. No new or additional evidence ever surfaced and the original evidence was not recovered until November, 1981.

On May 8, 1981, the government preferred charges against the petitioner. These charges arose solely from the January 23, 1981, search and arrest of petitioner. The basis for petitioner's conviction was therefore the same conduct on which the civilian authorities had based the original arrest. On the 27th of May, the convening authority ordered the Article 32, UCMJ [10 U.S.C. § 832], investigation on the preferred charges of possession of marijuana and hashish with intent to distribute.

The petitioner was scheduled to be released from active duty on August 16, 1981. Consequently, on June 17, 1981, the government placed petitioner on legal "hold," commencing on August 16 thereby preventing him from leaving the service. The Article 32 investigation did not begin until July 24, 1981, due to a two-week delay requested by a civilian counsel of one of the other three servicemen. The government then immediately continued the Article 32 investigation and did not reconvene it again until December 4, 1981.

Three months after the May 8, 1981, charges, the government preferred new charges against the petitioner. These charges duplicated the original ones, with the exception that the government added a con-

spiracy charge. There was no additional evidence at that time to substantiate this conspiracy theory.

During the period commencing with the preferral of the original charges on May 8, petitioner made repeated, diligent efforts to expedite his case and go to trial. He requested mast (a request for a personal meeting with command superiors) in connection with his May fitness report to correct the impression that he had already been convicted of the January charges. In July and August petitioner again requested mast to inquire about the status of his case and have the matter disposed of. Finally, on September 15, 1981, he submitted a formal demand for speedy trial. The government responded to petitioner's demands by stating that the request would be viewed "unsympathetically right up the line."

The reason given by the government for the delay in trying petitioner was so it could try the other three servicemen. The government's strategy was that these individuals would testify in accordance with their sworn statements and implicate the petitioner as the head of a drug distribution network.

The government's strategy concerning the "accomplices" was not successful. Granted immunity after each of their trials, all three recanted the portions of the sworn statements which linked the petitioner to the crime. The government therefore had no better evidence at the time of petitioner's trial than it did 11 1/2 months earlier—within days of the January 23, 1981, arrest by the civilian authorities.

The Article 32 investigation was finally convened on December 4, with the investigation concluding on December 7. The government referred the charges to a special court-martial on December 18, 1981.

Eight months after charges were preferred against him and 349 days after arrest by civilian authorities, petitioner was brought to trial. In that time, the defense was responsible for only two delays—one week attributable to military defense counsel and two and one half weeks due to petitioner's Christmas leave. The government was responsible for the rest of that time period.

As a result of the delay in being brought to trial, petitioner was forced to turn down three civilian job offers and three college acceptances. In addition, petitioner also experienced serious anxiety and depression as a result of the government's inordinate delay in charging and trying him. Petitioner's NCOIC (noncommissioned officer-in-charge of enlisted personnel in the unit) testified during trial that petitioner was seriously affected by the procedural delays and the government's unresponsive posture. According to this testimony, petitioner experienced mood changes of 180 degrees and became severely depressed.

Petitioner was tried by a special court-martial, composed of officer members, on January 7, 8, 14, 18, 19 and 20, 1982, and convicted of one specification alleging possession of marihuana and hashish with the intent to distribute, in violation of 21 U.S.C. § 841, and Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.

Prior to entering his pleas of not guilty, petitioner moved to have the charges dismissed on grounds of denial of his right to speedy trial. The military judge denied this motion.

Contrary to his pleas, petitioner was found guilty and sentenced to be reduced to pay grade E-1, to be confined at hard labor for sixty days and to be dis-

charged from the Marine Corps with a bad conduct discharge.

On April 8, 1983, the Navy-Marine Corps Court of Military Review affirmed the findings and the sentence. Concerning the speedy trial issue, that court stated:

> Appellant, who was not confined by military authorities prior to trial, was not denied a speedy trial. There is no showing that appellant was prejudiced in his ability to conduct his defense and the Government proceeded with due diligence to bring him to trial.

Appendix, p. 12a.

Petitioner appealed to the Court of Military Appeals, which granted review on the speedy trial issue on November 18, 1983. That court issued its decision on November 18, 1985, and affirmed the lower court holding.

In determining whether petitioner was denied his speedy trial right, the court relied on the four factors enunciated in *Barker v. Wingo,* 407 U.S. 514 (1972). These factors are (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to speedy trial and (4) prejudice to the defendant.

The court refused to hold the government accountable for the time after petitioner's arrest by the civilian authorities and calculated the time from the preferral of charges on May 8, 1981. The court was satisfied, however, that the delay between May 8, 1981, and January 7, 1982, the date of the special court-martial, was sufficient to trigger the remaining *Barker* factors.

The court found that the government's reason for delay, to obtain additional evidence against the accused, was not improper in itself. The court acknowledged that the government's strategy of obtaining additional evidence from the trials of the alleged accomplices was unsuccessful, but did not view this failure as turning "a permissible reason for delay into an impermissible one." Although admitting that the charges finally referred to trial were based on the original evidence from the January 1981 arrest, the court found the government's conduct appropriate.

The court further recognized that the petitioner did demand a speedy trial and thus fulfilled the third *Barker* factor. However, the court found that the petitioner did not satisfy the final *Barker* factor of prejudice. The court found that the petitioner did not suffer "oppressive pretrial incarceration" and any "anxiety and concern" beyond normal limits. Nor did the court believe that the delay impaired the petitioner's defense. Lastly, the court found no prejudice in the petitioner's involuntary retention on active duty. The court ignored the loss of job offers and college acceptances and focused solely on the petitioner's receiving his pay and leave time while forced to continue his duties in the Marine Corps. In sum, the court found that:

> Although the accused was involuntarily held for trial almost five months past the expiration of his enlistment, the delay was for a legitimate purpose and any prejudice was minimal.

The court therefore refused to reverse the decision below.

II. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Pursuant to his authority under Article 23, Uniform Code of Military Justice, 10 U.S.C. § 823, the Commanding Officer, Marine Corps Air Control Group 28, 2nd Marine Aircraft Wing, Fleet Marine Force, Atlantic, Marine Corps Air Station, Cherry Point, North Carolina, convened a special court-martial.

REASONS FOR GRANTING THE PETITION

The holding of the Court of Military Appeals that the government did not deny petitioner his Sixth Amendment right to speedy trial conflicts with decisions of this Court. The court below incorrectly applied the four-part standard in *Barker v. Wingo,* 407 U.S. 514 (1972), for determining if a violation of this right had occurred. Rather than considering the factors in relation to each other and the totality of the circumstances, the military court focused on one particular factor, prejudice to the accused. Moreover, the court required the petitioner to make an affirmative showing of prejudice. The lower court's subsequent finding of "minimal" prejudice to petitioner, despite his involuntary retention five months after his enlistment termination, also simply ignored this Court's broad interpretation of prejudice in the speedy trial context.

Further, the court below found that the government had a "legitimate, neutral purpose" in ignoring petitioner's demand for immediate trial and instead subjecting him to an inordinate delay. This characterization was erroneous. The government's motive was no more than a tactical move to gain time to search for evidence to support an otherwise totally unsubstantiated additional charge. Contrary to what the lower court held, this Court's decisions do not

validate such a governmental scheme. Moreover, even if the motive was neutral, as the military court concluded, the court failed to weight this factor against the government.

In *Barker v. Wingo,* 407 U.S. 514 (1972), this Court established a four-part balancing test to determine if an accused has been denied the right of speedy trial. This test weighs the conduct of both the prosecution and defendant. The *Barker* test requires courts to consider the following factors: (1) Length of delay; (2) The reason for the delay; (3) The accused's demand for a speedy trial; and (4) Prejudice to the accused. *Id.* at 530-31.

In framing the *Barker* standard, this Court emphasized that no one factor is determinative nor are all factors necessary to the analysis.

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. at 533. The court, however, did not follow this guideline in analyzing petitioner's claim.

Applying the *Barker* standards, the military court conceded that the amount of delay involved was sufficient to identify "a presumptively prejudicial" delay,

App. at p. 7a-8a, and trigger the remaining factors.[1] The court also acknowledged that petitioner had made a demand for an immediate trial. However, the court then failed to correctly assess and evaluate the other two factors of government motive and prejudice to the accused.

Instead of following the *Barker* court admonition to consider the factors together, the military court focused on prejudice to the petitioner, even requiring an affirmative showing of this factor. This Court clearly rejected such an approach to speedy trial analysis. In *Moore v. Arizona,* 414 U.S. 25, 26 (1973), the Court explained that *Barker* specifically rejected the need for an affirmative showing of prejudice to prove a violation of the speedy trial right.

The military court simply disregards the presumptive prejudice resulting from the length and the governmental reason for the delay in this case. The only real significance which the court below ascribes to the length of delay is as a triggering device for the remaining *Barker* factors. The military court does not accord this factor its full weight against the government. As for government motive, the military court views it in a positive light based on an erroneous characterization. As a result, the military court did not find that the government's reason prejudiced petitioner in any way.

Additionally, the military court summarily dismissed prejudice concerning the three interests identified by *Barker* and personal prejudice resulting from the in-

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[1]While the court below begins the government's accountability on May 8, 1981, the date of the preferrment of the original military charges, petitioner still contends that the accountability should begin on January 23, 1981, the date of the petitioner's arrest. The record demonstrates significant military involvement in the investigation, search, and arrest.

voluntary retention of petitioner on active duty while awaiting trial. This analysis was error.

First, while petitioner was not formally incarcerated, he was held in the military against his will. The lower court refused to recognize this status as a form of confinement. Yet federal courts, in cases cited by the military court in its decision, have found this condition to be a restraint on liberty. App., at 10a, n. 6.

Although the military court considered the involuntary retention as a possible circumstance resulting in prejudice, it wrongly concluded that any prejudice from this status was *de minimis*. In so finding, the court looked solely at the petitioner's continuing to receive pay, take leave and continue his normal duties. This list, however, is not an exhaustive list of indicia of liberty. Moreover, the military court completely failed to consider that the involuntary retention forced petitioner to forego several job offers and college acceptances.

Petitioner clearly suffered the same restraints which *Barker* identified concerning the individual on bond.

> Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

407 U.S. at 533.

Second, the record rebuts the military court's assertion that petitioner did not suffer anxiety and concern beyond normal limits. Petitioner's first line military supervisor testified during trial that petitioner exhibited depression and traumatic mood swings during the delay. (R. 35).

The military court simply interpreted the concept of prejudice in the speedy trial context too narrowly. This interpretation conflicts with that adopted by this Court. In *Moore v. Arizona,* 414 U.S. 25, 27 (1973), this Court described the nature of the prejudice resulting from an inordinate delay prior to trial. Such delay

> wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in his family and friends.

The *Moore* court found that prejudice could impact even an accused who was already incarcerated, citing possible harm to prospects for parole and rehabilitation. *Id.* Under this expansive definition of prejudice, petitioner met the test for prejudice in *Barker.* The military court erred in finding that prejudice was "minimal."

The military court characterized the government reason for the inordinate delay as proper and legitimate. This characterization was wrong. An analysis of the record in this case yields the inescapable conclusion that the government reason for delay was improper.

The sole reason for delaying petititoner's trial was to search for any evidence to substantiate the additional charge of conspiracy which previous investigation by the chief trial counsel established was merely a "hunch." As the chief trial counsel admitted:

> . . . [following a decision to conduct an Article 32 investigation] I was required to do some research

> to determine whether or not it was appropriate to refer a number of charges against all of the named accused, particularly conspiracy charges of sale, introduction and transfer against all the accused under an aider and abettor and principal theories. *At the conclusion of my research I determined that the evidence didn't support such charges* . . .

(R. 16) (Emphasis added.) Despite this conclusion, three months afterward, on August 14, 1981, on the basis of no additional evidence, the government preferred a conspiracy charge against petitioner. The government then adopted a wait-and-see attitude, ignoring petitioner's demand for immediate trial, in the futile expectation that the trials of the other accused might yield evidence to substantiate this hunch concerning a conspiracy. Since the record reflects that trial counsel had found the conspiracy theory lacking in merit, the government's reason was no more than a delaying tactic to avoid petitioner's trial to provide opportunity for additional "fishing" for evidence.

As the military court admitted, the government never succeeded in obtaining any evidence to support the conspiracy theory. The military court further stated, "In fact, the charges finally referred to trial were based on evidence available at the time of the arrest in January 1981." App. at 9a.

The military court attempted to justify the government's conduct by describing it in terms of litigation strategy which simply failed. This description cannot hide the true nature of the government's action—an intentional delay to gain a tactical advantage over the defendant. In this case the advantage was to buy time in order to bolster a non-existent charge of conspiracy. *Barker v. Wingo,* 407 U.S. at 531, n. 32, establishes that delays of this nature are improper and

should weigh heavily against the government. Moreover, the only reason that the Court did not dismiss the charges under similar circumstances in *Barker* was that the accused never requested speedy trial. As Justice White stated in his concurrence:

> Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus, it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise.

Id. at 536-37.

In contrast, petitioner here formally requested immediate trial, a request which the government not only deliberately ignored, but responded to by stating that the request would be viewed "unsympathetically right up the line." Yet petitioner was doing no more than exercising a constitutional right. *Barker* thus mandates a dismissal in the instant case.

Because the decision of the Military Court of Appeals conflicts with established precedent of this Court, review by this Court is required.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 1986

APPENDIX

APPENDIX A
UNITED STATES v. GROM

Cite as 21 M.J. 53 (CMA 1985)
UNITED STATES, *Appellee,*
v.

GEORGE F. GROM, SERGEANT (E-5)
U.S. Marine Corps, *Appellant.*

No. 46,788.
NMCM 82 4170.
U.S. Court of Military Appeals.
Nov. 18, 1985.

Accused, sergeant E-1, United States Marine Corps, was convicted by special court-martial of possession of marihuana and hashish with intent to distribute. The United States Court of Military Review affirmed. The United States Court of Military Appeals, Cox, J., held that Government's delay for tactical purposes in bringing accused to trial did not unfairly prejudice him or deny him of right to speedy trial.

Affirmed.

For Appellant: *James R. Klimaski, Esq.* (argued); *Elizabeth A. Karasik, Lieutenant Commander William A. DeCicco, JAGC, USN, Lieutenant Commander Richard K. Delmar, JAGC, USNR* on brief); *Lieutenant Commander Frederick N. Ottie, JAGC, USN*

For Appellee: Captain David B. Stratton, USMCR (argued); *Captain W.J. Hughes, JAGC, USN* (on brief); *Commander Jay M. Siegel, JAGC, USNR.*

OPINION OF THE COURT

COX, Judge

Tried by special court-martial, the accused was convicted, despite his pleas, of one specification alleging pos-

session of marihuana and hashish with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The adjudged and approved sentence extends to a bad-conduct discharge, confinement at hard labor for 60 days, and reduction to pay grade E-1. The Court of Military Review affirmed in a per curiam opinion.

We granted review of the following issue:

> WHETHER THE GOVERNMENT'S DELAY FOR TACTICAL PURPOSES IN BRINGING APPELLANT TO TRIAL UNFAIRLY PREJUDICED APPELLANT AND DENIED HIM HIS RIGHT TO SPEEDY TRIAL UNDER ARTICLE 10 UCMJ AND THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION

We hold there was nothing improper in the Government's motives and affirm.

The accused was arrested at his off-base apartment on January 23, 1981, by civilian law-enforcement authorities, after a search of his residence revealed the presence of drugs and other contraband. The search was conducted pursuant to a warrant issued by a civilian magistrate and was based upon information provided by an informant. On March 25, 1981, the civilian charges which had been filed against the accused were dismissed, after a series of scheduled hearings, because the civilian authorities were unable to produce the evidence which had been seized during the search of the accused's apartment.

The informant was a serviceman working for the Naval Investigative Service (NIS). Although the case against the accused was initially processed by civilian authorities, NIS agents also investigated it. On the day the accused was arrested, NIS agents secured sworn statements from three other servicemen who admitted their own involvement in drug transactions and identified the accused as their supplier. The information available at the time military charges were preferred indicated that the accused was the head

of a "drug distribution network." The Government's strategy was to try him last in anticipation that the other servicemen would testify against him in accordance with their sworn statements; however, this strategy backfired. After each of their trials, the accused's alleged partners-in-crime were granted immunity; and each, in remarkably similar fashion, effectively recanted those portions of their earlier sworn statements which linked the accused to crime.

The chronology of events in this case is as follows:

23 Jan 1981: Accused arrested at his off-base apartment by civilian police. Search reveals drugs and other contraband.

25 Mar 1981 Civilian charges against accused dismissed.

8 May 1981: Military charges preferred against accused. (These charges were never referred to a court-martial.)

27 May 1981: Article 32, UCMJ [10 U.S.C. § 832], investigation ordered by convening authority.

17 Jun 1981: Accused placed on legal "hold" effective 16 Aug 81.

10 Jul 1981: First scheduled meeting of Article 32 investigation. Two-week delay requested by civilian defense counsel. (This counsel also represented one of the other servicemen, and it appears that this delay was requested on behalf of that person and not the accused.)

24 Jul 1981: Article 32 investigation began.

14 Aug 1981: New charges preferred against accused. (In essence these charges duplicated those

of 8 May 1981, except that a conspiracy specification was added.)

16 Aug 1981: Accused's release from active duty date.

15 Sep 1981: Accused demands immediate trial.

18 Sep 1981: Reply from convening authority.

6 Oct 1981: Initial Article 32 investigating officer reassigned.

8 Oct 1981: Article 32 investigation scheduled to begin. Delayed apparently due to conflict in military defense counsel's schedule.

15 Oct 1981: Replacement investigating officer challenged for cause and relieved. Basis of challenge and party challenging not of record.

16 Oct 1981: Another investigating officer appointed and some evidence taken. Government counsel requests delay to await results of trial of the last of accused's alleged associates.

30 Oct 1981: Trial counsel absent on emergency leave.

5 Nov 1981: Trials of all alleged co-actors concluded.

19 Nov 1981: Trial counsel returns from emergency leave.

2 Dec 1981: Additional charges preferred.

4 Dec 1981: Next meeting of Article 32 investigation.

7 Dec 1981: Article 32 investigation terminated.

18 Dec 1981: Charges referred to a special court-martial.

18 Dec 1981-
4 Jan 1982: Accused on annual leave.

7-8, 14, 18-
20 Jan 1982: Trial and conviction of accused.[1]

The Government seeks to justify the delay on the grounds of prosecutorial discretion in scheduling the trials of the other three servicemen. We note that, in addition to the formal request for trial, the accused made numerous requests for mast with his commanding officer to find out the status of the charges against him.[2]

Apart from the normal anxieties of awaiting trial and some minor inconveniences, it appears that the accused's life and daily routine at the air station were largely unaffected by this series of events. In fact, he was allowed to take Christmas leave on the very eve of his pending trial. On the other hand, the accused asserts that because of his involuntary retention in the service beyond his normal date of separation from active duty he was unable to avail himself of several civilian job offers and the opportunity to attend one of several universities which had accepted his application.

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[1]The accused was also charged with a violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892, but that Charge and its specification were dismissed on motion.

[2]According to the accused's noncommissioned officer-in-charge, the accused adequately communicated his desire for expeditious processing of his case at mast:

> [A]ll he was going up for and requesting was when are you going—when is something going to be done, when are these delays—when are the postponements going to stop, when is some action going to be taken, when are you going to actually put charges against me of what I did, and that's an answer we were never able to get exactly what he was going to be charged with.

At the outset we observed that there is no doubt that the Government perfected extended personal jurisdiction over the accused as a result of its timely commencement of action with a view towards trial. *See United States v. Fitzpatrick,* 14 M.J. 394 (C.M.A.1983); *United States v. Self,* 13 M.J. 132 (C.M.A.1982). However, while an accused has no absolute right to immediate separation from the service at the expiration of his enlistment, the Government has an obligation to proceed to trial with all deliberate speed, absent the accused's acquiescence in the retention. *United States v. Fitzpatrick, supra* at 397; *United States v. Hutchins,* 4 M.J. 190, 192 (C.M.A.1978).

In general, accountability for speedy-trial tracking begins at the time of pretrial restraint or preferral of charges, whichever comes first.[3] Para. 215e, Manual for Courts-Martial, United States, 1969 (Revised edition); *see also United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971); *United States v. Burton,* 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971); *United States v. Williams,* 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967). Because there is no evidence of record that authorities of either the state or the United States were acting as agents for each other, the Government was not accountable for

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[3]In *United States v. MacDonald,* 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) the Court noted:

> A literal reading of the [Sixth] Amendment suggests that this right [to a speedy trial] attaches only when a formal criminal charge is instituted and a criminal prosecution begins.
>
> * * * * * *
>
> In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim. [Citation omitted.] Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment [citation omitted,] or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending.

Id. at 6, 7, 102 S.Ct. at 1500-01. In this case, the accused does not contend that a due-process violation occurred.

the time following the accused's arrest and charging by the state authorities. *Cf. United States v. Reed,* 2 M.J. 64, 67 (C.M.A.1976); *United States v. Williams,* 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961). Thus, the period of government accountability begins with the preferral of charges on May 8, 1981, even though these were not the charges on which the accused ultimately was tried. *See United States v. Avalos,* 541 F.2d 1100, 1108-09 (5th Cir.1976), *cert. denied,* 430 U.S. 970, 97 S.Ct. 1656, 52 L.Ed.2d 363 (1977).

Courts have wrestled with the concept of "speedy trial" which is, and has been, far easier to define than to apply to a given factual situation. We have tried to follow the concepts developed by the Supreme Court of the United States in several cases. *See United States v. Johnson,* 17 M.J. 255 (C.M.A.1984), for an analysis of these precedents. In *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the Supreme Court identified four factors which might be used to determine whether an accused has suffered a deprivation of his right to a speedy trial: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." These factors are to be balanced "on an *ad hoc* basis" *Id.* at 530, 92 S.Ct. at 2191 (footnote omitted).

The quantum of delay is "a triggering mechanism" for identifying a "presumptively prejudicial" delay. *Id.* Delays of as little as five or six months have caused the federal courts to inquire into the remaining *Barker* factors. *See United States v. Saintil,* 705 F.2d 415, 418 (11th Cir.), *cert. denied,* 464 U.S. 855, 104 S.Ct. 171, 78 L.Ed.2d 155 (1983); *United States v. Ransom,* 465 F.2d 672, 673 n. (D.C.Cir.1972). In the instant case, the respective parties calculate vastly different periods of delay as chargeable to the other. However, save for a one-week delay attributable to military defense counsel and the accused's two-and-one-half-week Christmas leave (which the Government was, in any event, in a position to prevent), this record reveals no delay attributable to the defense between May 8, 1981,

and January 7, 1982. Therefore, we are satisfied that the case merits our balancing of the remaining *Barker* factors.[4]

Looking at the second *Barker* factor—"the reason for the delay"—we conclude that it was primarily caused by the Government's desire to obtain additional testimony against the accused. We find nothing improper in this motive, as such. A prosecutorial decision to await the results of another trial to obtain the testimony of a witness is, by itself, a neutral factor. *See United States v. Fairchild,* 526 F.2d 185 (7th Cir.1975), *cert. denied,* 425 U.S. 942, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976); *United States v. Baumgarten,* 517 F.2d 1020 (8th Cir.), *cert. denied,* 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 11 (1975); *United States v. Johnson,* 3 M.J. 143 (C.M.A.1977). *But cf. United States v. Lara,* 520 F.2d 460, 464 (D.C.Cir.1975) (prosecutors obtained dismissal of an indictment in one district in order to indict the defendant in another district which they believed would be more sympathetic to their cause); *Arrant v. Wainwright,* 468 F.2d 677, 681 (5th Cir.1972) (prosecutor delayed trial "because he 'did not want to see . . . [the defendant] be acquitted of this crime' ")

In *Barker,* most of the five-year delay between arrest and trial was due to the prosecution's efforts to obtain a conviction and thus utilize the testimony of Barker's co-actor. The Supreme Court indicated that this may be a permissible reason for delay under ordinary circumstances. The delay in that case was, of course, extraordinary.

In the present case, it appears that the Government was willing to delay trial in the accused's case until after trial of his alleged co-actors in the reasonable expectation of acquiring admissible evidence on serious additional charges. With the benefit of hindsight, it is obvious that

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[4]We note that R.C.M. 707(a), which was not in effect at the time of the accused's trial, provides: "The accused shall be brought to trial within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier." We take this as an indication of the amount of pretrial delay that is ordinarily tolerable in a military context.

the ends of justice would have been better served if the Government had proceeded to trial with the evidence at hand,[5] instead of delaying trial to obtain additional evidence. In fact, the charges finally referred to trial were based on evidence available at the time of the arrest in January 1981. That the Government's strategy failed, however, does not turn a permissible reason for delay into an impermissible one. Once the witnesses recanted their statements incriminating the accused at his Article 32 investigation, the unsubstantiated charges were promptly withdrawn, and the remaining charges were referred to a special court-martial.

The third *Barker* factor weighs in the accused's favor, as he did demand trial. This indicates that he actually desired a speedy trial, unlike the situation in *Barker* where the defendant, for tactical reasons or otherwise, did not. The Supreme Court found no violation of Barker's sixth-amendment right to a speedy trial, expressing reluctance to rule that a defendant was denied a speedy trial that he did not want.

The final factor to be considered is prejudice to the accused. *Barker* stated that there are

> [three] interests of defendants which the speedy trial right was designed to protect. . . .: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system

Id. 407 U.S. at 532, 92 S.Ct. at 2192 (footnote omitted). As to the first interest, there was no "oppressive pretrial incarceration" here. As to the second, there is no indication that the "anxiety and concern" suffered by this accused exceeded the norm. As to the third, there is no

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[5]The evidence that had been temporarily misplaced in civilian channels was later retrieved and admitted in evidence in the accused's trial.

basis in this record for contending that the accused's defense was impaired by the passage of time. If anything, it was the prosecution's case that deteriorated.

Further, although he was not confined during the relevant period, the accused claims specific prejudice due to his involuntary retention on active duty. We have held that mere retention beyond expiration of service date for the purpose of administering military justice is not, by itself, tantamount to arrest or confinement.[6] *United States v. Rachels,* 6 M.J. 232 (C.M.A.1979); *United States v. Amundson,* 23 U.S.C.M.A. 308, 49 C.M.R. 598 (1975). However, while the retention of a service-member beyond the expiration of his enlistment does not establish prejudice *per se,* it "is a circumstance to be considered in determining whether he has been prejudiced by pretrial delays." *United States v. Douse,* 12 M.J. 473, 481 (C.M.A.1982) (Everett, C.J., concurring in the result). Here, the prejudice to the accused was slight. He continued to receive pay and allowances; he was allowed leave, liberty and the other privileges of his military status; and he performed his normal duties.

Applying the *Barker* factors to the instant case, we are not persuaded that the accused was denied his right to a speedy trial. Although the accused was involuntarily held for trial almost five months past the expiration of his enlistment, the delay was for a legitimate purpose and any prejudice was minimal. We are, therefore,unwilling to reverse the decision of the court below on this ground.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

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[6]Nonetheless, improper retention in the armed forces can be ground for *habeas corpus* relief. *Parisi v. Davidson,* 405 U.S. 34, 39, 92 S.Ct. 815, 818, 31 L.Ed.2d 17 (1972); *Hall v. Richards,* 447 F.2d 98 (9th Cir.1971); *Adkins v. United States Navy,* 507 F.Supp. 891 (S.D.Tex.1981).

APPENDIX B
DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332

IN THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW
BEFORE

O.L. CEDARBURG | MATTHEW J. GORMLEY III | A.F. MIELCZARSKI

UNITED STATES
v.

GEORGE F. GROM,
043 62 2092, Sergeant (E-5),
U.S. Marine Corps

NMCM 82 4170 DECIDED 8 April 1983
Sentence adjudged 20 January 1982 Review pursuant to Article 66(c), UCMJ

of Special Court-Martial convened by Commanding Officer, Marine Air Control Group 28, 2nd Marine Aircraft Wing, Fleet Marine Force, Atlantic, Marine Corps Air Station, Cherry Point, North Carolina 28533

LCDR William A. DeCicco, JAGC, USN, Appellate Defense Counsel
LCDR Richard K. Delmar, JAGC, USNR, Appellate Defense Counsel
CDR Jay M. Siegel, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error, the Government's reply thereto, the trial defense counsel's response to the staff judge advocate's review, and the clemency petitions submitted in behalf of the ap-

pellant and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. There was no error occasioned by the action taken by the convening authority in this case where immunity to a prospective witness had been granted by the officer exercising supervisory authority in the normal chain of command.[1] *See United States v. Newman,* 14 MJ 4/4 (CMA 1983). A thorough review of the record of trial convinces us beyond a reasonable doubt that appellant was properly convicted of the offense of possession of marijuana with intent to distribute it. Appellant, who was not confined by military authorities prior to trial, was not denied a speedy trial. There is no showing that appellant was prejudiced in his ability to conduct his defense and the Government proceeded with due diligence to bring him to trial. The motion to suppress the confiscated contraband drugs, on the basis of an alleged violation of the Posse Comitatus Act, 18 U.S.C. §1385, was properly denied. *See United States v. Brown,* 9 MJ 666 (NMCMR 1980). A bad conduct discharge in the case of appellant, a Marine Corps sergeant, convicted of possession of marijuana with the intent to distribute it, is totally appropriate. The remaining assignments of error are without merit.

Accordingly, the findings and sentence as approved on review below are affirmed.

O.L. CEDARBURG, Chief Judge

MATTHEW J. GORMLEY, III, Judge

A.F. MIELCZARSKI, Judge

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[1]The supervisory authority who granted the immunity disqualified himself and the supervisory action was taken by a general court-martial authority outside of the convening authority's chain of command.

(2)

No. 85-1198

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE F. GROM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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11 MP

QUESTION PRESENTED

Whether petitioner was denied his Sixth Amendment right to a speedy trial under *Barker* v. *Wingo*, 407 U.S. 514 (1972).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1198

GEORGE F. GROM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-10a) is reported at 21 M.J. 53. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on November 18, 1985. The petition for a writ of certiorari was filed on January 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Following a special court-martial, petitioner, a member of the United States Marine Corps on active duty, was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. He

was sentenced to a bad conduct discharge, confinement at hard labor for 60 days, and reduction to pay grade E-1. The convening and supervisory authorities approved the sentence without change. The Navy-Marine Corps Court of Military Review affirmed (Pet. App. 11a-12a) and, on further review, the United States Court of Military Appeals also affirmed (*id.* at 1a-10a).

1. The evidence at petitioner's court-martial, the sufficiency of which is not in dispute, showed that petitioner possessed a small cache of marijuana and hashish in his off-base apartment in Emerald Isle, North Carolina. The drugs were discovered on January 23, 1981, by civilian and military law enforcement authorities during a search of petitioner's apartment conducted pursuant to a warrant obtained by civilian Deputy Sheriff Galizia. Galizia arrested petitioner the same day and he was arraigned on state drug possession charges. The civilian charges were dismissed on March 25, 1981. Military authorities preferred charges against petitioner on May 8, 1981. Pet. App. 2a-3a; see Tr. 10, 15-16, 42, 82, 86, 207, 209, 211, 214; Tr. App. Exhs. 9, 11.

The same day that petitioner's apartment was searched, three other Marines were apprehended for drug possession at Marine Corps Air Station, Cherry Point, North Carolina. These servicemen confessed and identified petitioner as their supplier. Military authorities therefore determined to secure the convictions of the three Marines and then to use their immunized testimony in order to convict petitioner of more serious charges of selling, transferring, and introducing marijuana on the base. During the formal pretrial investigation of petitioner's case,[1] however, the Marines unexpectedly recanted their sworn confessions and refused

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[1]Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, requires completion of a "thorough and impartial investigation" before a charge or specification may be referred to a general court-martial.

to implicate petitioner in any drug transactions. Accordingly, the charges affected by this testimony were dropped, leaving only the charge arising from the seizure of drugs at petitioner's off-base apartment. Following completion of the pretrial investigation on December 7, 1981, the possession charge was referred to a special court-martial on December 18, 1981. At the request of petitioner and his counsel, the trial date was continued until January 4, 1982. Pet. App. 2a-5a; see Tr. 16, 25-26, 44; Tr. App. Exhs. 1, 3-9.

2. The Court of Military Appeals held that the eight-month period between institution of military charges and the court-martial did not violate petitioner's Sixth Amendment right to a speedy trial. Pet. App. 1a-10a. Applying the balancing test established by this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), the court reasoned that while the delay in this case was sufficient to trigger a full inquiry into the relevant factors under *Barker*, the military's decision to postpone trial in order to obtain the testimony of the three other Marines was a legitimate reason for the delay, and petitioner did not suffer undue prejudice as a result of the delay. Pet. App. 7a-10a.

ARGUMENT

Petitioner argues (Pet. 8-14) that the Court of Military Appeals erred in applying the *Barker* balancing test. This factbound contention is plainly without merit and it warrants no further review.[2]

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[2]We note as well that subsequent to petitioner's court-martial, a rule modeled after the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, became effective in military proceedings. See *Manual for Courts-Martial, United States, 1984*, Rule 707, 49 Fed. Reg. 17152, 17189-17190 (1984). Like the Act, this rule has "mooted much litigation about the requirements of the Speedy Trial Clause." *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 1 n.1.

The delay in this case of only eight months—during which petitioner was neither incarcerated nor required to post bail—is scarcely of such magnitude even to require detailed inquiry into whether it might rise to the level of a constitutional violation.[3] See *United States* v. *Lewis*, 759 F.2d 1316, 1350 n.16 (8th Cir. 1985), cert. denied, No. 85-69 (Nov. 18, 1985) (seven-month delay not sufficiently prejudicial to trigger further analysis of *Barker* factors); *United States* v. *Otero-Hernandez*, 743 F.2d 857, 858 n.3 (11th Cir. 1984) (same). Moreover, the government's attempt to secure the testimony of other witnesses who had made sworn statements implicating petitioner in more serious offenses was a wholly legitimate reason that justified the slight delay that did take place. See, *e.g.*, *Barker* v. *Wingo*, 407 U.S. at 531; *United States* v. *Fairchild*, 526 F.2d 185, 187 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976); *United States* v. *Baumgarten*, 517 F.2d 1020, 1025 (8th Cir.), cert. denied, 423 U.S. 878 (1975). Contrary to petitioner's apparent contention (Pet. 8, 12-13), there was absolutely no showing in this case of "bad faith or dilatory purpose on the Government's part." *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 13. As the court below concluded, "[o]nce the witnesses recanted their statements incriminating [petitioner] * * *, the unsubstantiated charges were promptly withdrawn, and the remaining charges were referred to a special court-martial." Pet. App. 9a; see also Tr. 14-20, 21-23; Tr. App. Exhs. 1, 9.

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[3]Petitioner's contention (Pet. 10 n.1) that the period of delay should be measured from the time that state charges had been instituted is without merit because petitioner was neither arrested nor charged by military or other federal authorities at that time. See *United States* v. *MacDonald*, 456 U.S. 1, 10 n.11 (1982) ("Of course, an arrest or indictment by one sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign."). Even if he were correct, however, the additional 3 and one-half months of delay would hardly be sufficient to change the result.

The Court of Military Appeals properly concluded that petitioner did not suffer significant prejudice from the delay in light of the absence of pretrial restraints and any impairment to the defense. Pet. App. 9a-10a. Indeed, petitioner benefited in several important respects from the delay: the most serious charges against him were dropped after the other Marines recanted their statements; the case was referred to a special court-martial rather than a general court-martial, thereby exposing petitioner to a significantly less severe maximum punishment (see *Middendorf* v. *Henry*, 425 U.S. 25, 31 (1976)); and "[i]f anything, it was the prosecution's case that deteriorated" (Pet. App. 10a) during the delay. Petitioner is obviously incorrect in arguing (Pet. 8, 10-12) that the court below imposed too heavy a burden of demonstrating prejudice. To the contrary, the Court of Military Appeals found that the delay in this case was " 'presumptively prejudicial' " (Pet. App. 7a, quoting *Barker*, 407 U.S. at 530), and it carefully analyzed petitioner's contentions with respect to actual prejudice. Pet. App. 5a, 9a-10a.[4] The court simply concluded that, on balance, the "minimal" (*id.* at 10a) prejudice to petitioner was insufficient, in light of the relatively short and adequately justified delay, to give rise to a violation of the Sixth Amendment.

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[4]The delay in this case did not cause petitioner irrevocably to lose various educational and employment opportunities, as he asserts (Pet. 11). Rather, the delay forced only a postponement of his plans. See Tr. 43. Moreover, petitioner could have continued his college education at Eastern Carolina University while he was awaiting trial, and he had in fact rejected the job offers in question primarily because he wished to pursue his education. See Tr. 42-44, 377. Indeed, petitioner had not even ruled out continuing his military career (see Tr. 378), an option foreclosed not by the delay in this case but by his conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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